arrear," or whether they mean "if two monthly deposits are in arrear," which is the contention of the Association.

Now their Lordships think that it has to be remembered, in dealing with a clause of this kind, that it is of the nature of a forfeiture, and it has got to be reasonably clear that the forfeiture operates. Their Lordships find themselves unable to come to the conclusion that the Association have made out that the forfeiture did apply in this case. On the contrary, they agree with the view taken by the Court of Appeal of the Supreme Court. They think that on the true construction of this rule it means that in order to work a forfeiture a monthly deposit has to be in arrear for the period of two months; in other words, that the period of two months applies to the period of default for each deposit and not to the number of subscriptions that have to be in arrear.

It is a simple question of construction. One can quite understand another view being taken, and no question arises but that the Association have put forward a *bona fide* claim in this case, intending to maintain what they think is the true construction of their rule. In their Lordships' opinion that is not the true construction of the rule, and therefore this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants—
Herbert Z. Deane & Co.

[APPELLATE CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.), PRICHARD & TERRELL, JJ.

January 26, 1935.

N. N. SOCKALINGAM CHETTIAR vs. A.R.S.P. PALANIAPPA CHETTIAR.

[SINGAPORE SUIT No. 642 of 1933.]

[SINGAPORE APPEAL No. 9 of 1934.]

Limitation of Suits—Ordinance No. 56 (Limitation) articles 41 and 42—Money deposited by Customer with Banker repayable on demand—Starting point of period of Limitation.

When a customer deposits money with his banker such money being repayable on demand, the period of limitation does not begin to run until a demand for payment is made.

Judgment of Huggard, C.J. reported in 1934 S.S.I.R. 276; 3 Mal. L.J. 207 affirmed; Thomas C.J., F.M.S., dissenting as to part of the Judgment not affecting the question of limitation.

Appeal to the Court of Appeal from the Judgment of Huggard C.J. reported in (1934) S.S.L.R. p. 276 and 3 Mal. L.J. 207.

The appeal came on for hearing in Singapore on the 3rd and 4th December before Thomas C.J., F.M.S., and Prichard and Terrell JJ. The facts and arguments are fully set out in the report of the case in the Court below.

K. K. O'Connor, for Appellant (Defendant)
E. R. Koek, for Respondent (Plaintiff)

Cur. Ad. Vult.

THOMAS, C.J., (F.M.S.)—I have had the advantage of reading the judgment of my learned brother a'Beckett Terrell. I agree with it on the question of limitation, and I do not wish to add anything to what he has said.

I should like, however, to deal with that part of the claim which relates to the sum of $6,996.71.

Turning to the pleadings, the plaintiff in paragraph 6 of his statement of claim states that on the 6th of February 1931, the amount standing to the credit of the Seethai deposit account amounted to $6,735.33¾, and was then credited by Suppiah in the name of the plaintiff. In paragraph 7 of the statement of claim the plaintiff states that this deposit account with interest to date was stated and settled between the plaintiff and Suppiah at the sum of $6,996.71¼. Suppiah caused an account to be written by the defendant, and handed to the plaintiff showing a balance due to the plaintiff by Suppiah at the said date of the said sum. The defendant in his defence states that:—

> "As to paragraph 6 of the statement of claim, he admits that on the 6th of February, 1931 Suppiah caused entries to be made in his books purporting to credit the plaintiff in place of the said Seethai with the sum of $6,735.33¾ then standing to the credit of the said account, but the said Seethai was at such date dead. Such transaction was carried out by Suppiah at the request of the plaintiff who purported to act as attorney of the said Seethai without disclosing the fact that she was then dead, and who intended thereby to avoid payment of estate duty upon the said sum. Defendant will contend that such transaction was ineffectual to pass any rights in the said sum to the plaintiff."

The defence in paragraph 5 admits paragraph 7 of the statement of claim.

With regard to the allegation that the death of Seethai Achi was not disclosed, the learned trial Judge has found that Suppiah knew that she was dead, and was present at her funeral ceremonies in India in 1927.

The learned trial Judge has stated in his Judgment that the point in dispute was whether the deposit account was the property of the plaintiff or the property of Seethai Achi.

The evidence of the plaintiff is summarised by the learned trial Judge as follows:—

> "He states, that he never intended to part with the property in this money, that he retained control of it, that Seethai Achi could not draw upon the account without his authority, that both Muthiah and Suppiah—in the K. S. P. Firm—knew of the conditions under which the money was deposited, and that on each of the four occasions upon which the account was drawn upon it was upon his instructions."

This evidence was accepted by the learned trial Judge.

Now, whenever money has been put by one person into the name of another, it is always permissible to show that no gift or settlement was intended, and even after the death of the person who has placed money in the name of another, it is permissible to prove on such grounds as the retention of control over the fund etc., that no gift or settlement was intended—(see *Gaskell* v. *Gaskell*, 148 E.R. 1017; *Vandenbergh* v. *Palmer*, 70 E.R. 85; and *Field* v. *Lonsdale*, 51 E.R. 30).

And where an account with a Bank is closed on the death of a customer, the duly appointed representative will be entitled to be paid the amount of a credit balance; and no other person will be able to maintain any claim against the banker in respect of it, unless he can show that the balance represents trust moneys to which he is entitled, or other moneys which he is entitled to follow according to certain principles or—which it would be difficult to do—that the customer was in reality acting as his agent in the matter of the account—(see *Hart's* Law of Banking, Vol. 1 page 295).

In all such cases it is usual to make the payee of the sum in question or his representative a party to the proceedings.

In the present case it has been contended that there is a *jus tertii*, and until that right has been disposed of, the plaintiff cannot recover the sum in question. There are of course occasions when there is such a defect in the contention of *jus tertii* that it may be ignored.

In his judgment in the case of *Colland* v. *Lloyd & Others*, 151 E.R. 307, Lord Abinger, C.B. said:—

> "The question is, whether the bankers, when the plaintiff has given them notice that it is his money, have the right to set up the *jus tertii*. The answer is that there is no *jus tertii*; it is admitted that the money is the plaintiff's, and the defendants are merely setting up an unlawful title in answer."

In the case of the *Societe Coloniale Anversoise* v. *London and Brazilian Bank*, (1911) 2 K.B. 1024 Scrutton, J. said in his judgment:—

> "When a principal places money in the bank on the terms that a known agent shall draw upon it, he retains, in my view, the power, if he rightly determines the agency, to require the bank to return the undrawn balance to him."

In the present case Seethai Achi died in 1927. The money was left standing in her name until 1931. It might have been claimed by her representative. But there has been no application for the administration of her estate, and no claim has at any time been made in respect of this sum. It has been stated in the course of the argument that the plaintiff would be entitled to apply for letters of administration.

Now, section 156 of the Civil Procedure Code provides that:—

> "If in any cause, matter or other proceeding it appears to the Court or a Judge that any deceased person, who was interested in the matter in qnestion, has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding, on such notice to such person, if any, as the Court or Judge, thinks fit, either specially or generally by public advertisement."

The attention of the learned trial Judge does not appear to have been drawn to this section, and no application was made to him either to proceed in the absence of any person representing the estate of Seethai Achi, or to appoint some person to represent her estate. There is nothing on the face of the judgment to show that any such order was made—(See *In re Richerson, Scales* v. *Heyhoe* (No. 2), (1893) 3 Ch. D. 146). It is not, therefore, binding on the estate of Seethai Achi.

The learned trial Judge has said that the point in dispute was whether the deposit account was the property of the plaintiff or the property of Seethai Achi. He has determined that question in favour of the plaintiff. But in that Seethai Achi was not represented at the hearing there would seem to be nothing to prevent a person appointed to administer her estate from suing the defendant.

Under these circumstances it would seem that there is a *jus tertii* to be considered, and that the plea of *jus tertii* cannot be ignored.

With great respect, therefore. I consider that the claim for the sum of $6,996.71¼ should be remitted to the learned trial Judge to enable

section 156 of the Civil Procedure Code to be complied with, and for all consequential steps to be taken, and that for this purpose, the judgment given in favour of the plaintiff in respect of this amount should be set aside.

To this extent the appeal, should, in my opinion, be allowed.

In view of the judgments of my learned brothers Prichard and a'Beckett Terrell dismissing the appeal, I do not consider it necessary to make any order as to costs.

PRICHARD, J.—I have had the opportunity of reading the judgment of my learned brother a'Becket Terrell in this matter and I quite agree with it.

As the learned Chief Justice, F.M.S. while concurring on the question of limitation takes a different view on the facts relating to the sum of 36,996.71¼, I should like to add a few words.

There can be no dispute that the Defendant accepted the Plaintiff as his creditor. In paragraph 5 of the defence the Defendant admits the allegation contained in paragraph 7 of the Statement of Claim that on the 8th August, 1931, the deposit account with interest to that date was stated and settled between the Plaintiff and Suppiah at the sum of $6,996.71¼. On 1st April, 1932, the Defendant filed an affidavit for the Commissioner of Stamps in which the Plaintiff is mentioned as creditor for $10.691.05. It is obvious that this sum must include the amount formerly belonging to Seethai Achi. In my opinion the Defendant has clearly admitted his liability and the Plaintiff is entitled to recover.

It has been suggested that Seethai Achi, if she had been alive, or her legal personal representative, if one had been appointed after her death, could have sued the Defendant and that in those circumstances the Defendant might possibly be made to pay twice over. Consequently it is said there is in existence a *jus tertii*. If that were so it was for the Defendant to have satisfied the learned trial judge that the money really belonged to Seethai Achi. He has not succeeded in doing this. I agree that in the circumstances that have arisen the Defendant may have to pay twice. but if that is so he has only himself to blame. He should have envisaged this possibility before trial and he could have applied that Seethai Achi's estate be represented. The Defendant has not chosen to adopt this attitude and I can see no reason why the Court should now remit the question of the $6.996.71¼ to the learned trial judge for a personal representative of Seethai Achi to be appointed.

Under Section 156 of the Civil Procedure Code the judge has a discretion in the matter and I doubt if under the present circumstances he would make any such order unless this Court directed him to do so. For my part I should not be in favour of giving any such direction.

I think the appeal should be dismissed with costs.

TERRELL, J.—Before the learned trial Judge, Sir Walter Huggard, Chief Justice, the plaintiff recovered judgment (a) for the sum of $6,996.71¼ and interest, and (b) for a sum of $3,556.59⅛ and interest. The defendant is the administrator of A. R. S. P. Suppiah Chettiar deceased.

The defendant has appealed to the Court of Appeal on two grounds, (1) that the first named sum was the property of one Seethai Achi who died in 1927 and that the plaintiff was not entitled to sue for and recover the sum, and (2) that both claims fell under Art 41 of Ordinance No. 56 (Limitation) and were barred.

I accept the findings of the learned Chief Justice as to the following facts: prior to the year 1918 Seethai Achi had a deposit account with the firm of K. S. P., the predecessor of the firm of A. R. S. P.; the account was credited with interest from time to time and that in 1926 the amount standing to the credit of the account was $4,981.84⅜, and that in that year the account was transferred from the firm of K. S. P. to the firm of A. R. S. P. of which Suppiah deceased was the sole proprietor. In 1927 Seethai Achi died, but the account continued in her name until the 6th February, 1931 when it stood at $6,735.33⅜, and was at the request of the plaintiff to Suppiah transferred into the name of the plaintiff, and the account has been continued in the name of the plaintiff since that time. On the 8th August, 1931, an account was stated and settled between the plaintiff and Suppiah at the sum for which judgment has been recovered, namely $6,996.71.

I also accept the finding that although the account started as a deposit account it was so for only three months, that this period has long since expired and that both accounts are now on the same footing and are to be treated as current accounts.

It is also not disputed that the relationship between the plaintiff and Suppiah was that of customer and banker.

The appellant argued that Art. 41 of the Ordinance applied, whereas the plaintiff (respondent) acted on Art. 42. It is not disputed that if the former article applies the claim is barred, whereas under Art. 42 it is not barred, as time would only run from the date of demand. The articles read as follows:—

41. For money lent under an agreement that it shall be payable on demand.	Three years.	Time begins to run — When the loan is made.

42. For many deposited under an agreement that it shall be payable on demand.	Three years.	Time begins to run — When the demand is made.

This point has been dealt with at length in the judgment of the learned Chief Justice, and as I respectfully agree with his conclusions, it is not necessary to recapitulate all his reasons for deciding that Art. 42 governed the present case.

In my opinion the English cases are chiefly valuable as enunciating general principles and cannot be regarded as direct authorities on the question of limitation for the reason that in England limitation runs from the date that the cause of action arises, and not, as here, from the date of the loan (Art. 41) or from the date of the demand (Art. 42). As under both articles a demand is contemplated the English decisions will not assist in distinguishing the one article from the other.

The case of *Foley* v. *Hill*, 109 E.R. 1002, however, while making it clear that the relationship between banker and customer is not fiduciary but is the ordinary one of debtor and creditor, establishes that there is the superadded obligation arising out of the custom of bankers to honour customers' drafts. The case of *Joachimson* v. *Swiss Bank Corporation*, (1921) 3 K.B. 110, carried the matter further and at pp. 118 and 119 Bankes L.J. points out that the decision in the House of Lords cannot be treated as an exhaustive definition of all the obligations arising out of the relation between banker and customer, and that having regard to the peculiarity of that relation there must be quite a number of implied superadded obligations beyond the one specifically mentioned in *Foley* v *Hill*.

This consideration is important in reviewing the Indian cases *Ichha Dhanji* v. *Natha*, I.L.R. 13 Bomb. 338, and *Dharam Das* v. *Ganga Devi*, I.L.R. 29 All. 773, in both of which it was held that Art. 59 of the Indian Act (corresponding to our Art. 41) applied. In the former case the Court having accepted the ruling in *Foley* v. *Hill* that the relationship was one of borrower and lender, seems to have decided that that concluded the matter, disregarding the various superadded obligations which distinguish a customer's account with a bank from a simple loan. I prefer the reasoning adopted in the case of *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*, I.L.R. 16 Cal. 25, where it was held that the word 'deposit' was essentially referable to a customer's account with a banker. The following passage occurs in the judgment of the Court at p. 29:—

> "Assuming money paid to a man's credit with his banker to be money lent to the latter, the loan is at least of a very special kind having many peculiarities which have often been pointed out. And the question is a deposit within the meaning of Art. 60 (our Art. 42). That in ordinary and popular language it is so there can, we think, be no doubt. Take up a newspaper, and look at the returns of any bank which publishes the details of its position, and you will always find public and private deposits used in the sense of balances. Indeed 'deposit' seems to be the word which any one not a lawyer would be more likely to use than any other to express money in a bank."

This case was followed in *Perundevitayar Ammal* v. *Nammalvar Chetti and Anor.*, I.L.R. 18 Madras 390, in which it is laid down (p. 392) that there can be no doubt that an essential distinction exists between loans pure and simple to be paid back on demand, and deposits with a banker similarly repayable.

I have no doubt therefore that a customer's money with a bank whether on current account or not is more properly described as a deposit than as a loan, and that the same principles apply to the accounts which are the subject matter of the present action. Accordingly Art. 42 is the article applicable.

As regards the facts, the learned trial Judge accepted the evidence of the plaintiff that the account in the name of Seethai Achi was in fact the account of the plaintiff. Counsel for the respondent argued in this Court, as in the Court below, that the defendant and his predecessor in title, Suppiah, having accepted the plaintiff as his creditor, could not now set up a *jus tertii* and plead as a defence that in fact the money belonged to someone else. This argument is not dealt with in the judgment of the learned Chief Justice. There can be no dispute that the defendant did accept the plaintiff as his creditor. The plaintiff pleaded in para. 7 of the statement of claim that on the 8th August, 1931, the deposit account with interest to that date was stated and settled between the plaintiff and Suppiah at the sum of $6,996.71¼, and in para. 5 of the defence this allegation is admitted. Suppiah died in November, 1931, and since that date there is ample evidence that the present defendant recognized the plaintiff as his creditor in various documents. I need only refer to the affidavit for the Commissioner of Stamps filed by the defendant on the 1st April, 1934, in which he shows the plaintiff as a creditor for the sum of $10,691.05 which admittedly includes the deposit account formerly standing in the name of Seethai Achi.

In these circumstances I am of opinion that the principle laid down in the case of *Cocking* v *Ward*, 135 E.R. 781, applies. In that case the

plaintiff having failed upon a special count on the ground that the contract relied on could only be proved by a note or memorandum in writing, was held to be entitled to recover as on an account stated. After reviewing the authorities, Tindal, C. J. in delivering the judgment of the Court says at p. 870:—

> "And we think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise; and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming; but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it."

Certainly the defendant was entitled to plead limitation, but having failed on that he has admitted his liability. Nor do I think that his liability was merely moral, or was a promise made without consideration. The fact that the defendant has had the use of the money since the date of the transfer of the account into the plaintiff's name, in my opinion, imports that valuable consideration was given.

Apart from the fact that Suppiah accepted the plaintiff as his creditor the mere allegation of a *jus tertii* in Seethai Achi would not be a defence unless the defendant could satisfy the Court that the deposit was actually the property of Seethai Achi and this he failed to do on the evidence before the Court. In the case of *Societe Coloniale Anversoise* v. *London & Brazilian Bank*, (1911) 2 K.B. 1024, the plaintiffs recovered against the Bank in respect of an account which stood in the name of the plaintiffs' former agent, one Kloz. Kloz had actually made a claim on the fund but although he was not represented at the trial, on the evidence the Court was satisfied that the account was in fact the account of the plaintiffs. The Court can only decide issues between the parties who appear before it. As Seethai Achi's personal representative was not before the Court, the judgment is not of course binding on her estate, and there is nothing to prevent such a personal representative from commencing proceedings for the purpose of establishing the claim of her estate (see *In re Richerson, Scales* v. *Heyhoe* (No. 2), (1893) 3 Ch.D. 146).

These considerations do not however affect the liability of the defendant to the plaintiff in the present suit. It has been argued that the defendant might conceivably be called upon to pay twice over. With that this Court is not concerned. The defendant has obtained a reduction of the amount assessable for estate duty by setting up this debt. If he had been honestly willing to discharge his obligations, but merely felt a doubt as to the party to whom the debt was payable, he could have protected himself by having the estate of Seethai Achi represented in this action. The judgment would then have been binding on all the parties who could possibly make a claim. As, however, he elected to use every means to avoid paying the debt at all, he has only himself to blame for the situation which has arisen.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant:—*Drew & Napier.*

Solicitors for the Respondent:—*Chan & Eber.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

February 23, 1935.

RE LEE CHOON GUAN, DECEASED.

LEW AH LUI (f) v. CHOA ENG WAN & ORS.

[SINGAPORE SUIT No. 253 of 1934]

[IN FORMA PAUPERIS]

Chinese marriage—Secondary wife—Requisite elements from which such marriage will be implied—Chinese divorce—Secondary wife—Requisite elements.

To prove a Chinese secondary marriage, though no ceremony need be proved, it is necessary to prove (a) long continued cohabitation (b) an intention to form a permanent union (c) repute of marriage. Recognition by the husband's family is one of the strongest forms of reputation of marriage.

A Chinese can divorce his secondary wife at will. No actual ceremony is needed; it depends on the definite intention to break off the relationship and the notoriety given to the fact of dissolution. *Re Sim Siew Guan, deceased*, (1923) S.S.L.R. 539, 1 Mal.L.J. 95, followed.

Trial of Action.

The Testator, Lee Choon Guan made a will by which among other gifts he bequeathed a share of income to his son, Lee Pang Seng and provided that after the death of Lee Pang Seng his widow should receive an annuity or monthly